Edmund Chan Kai Khoon v Puan Abrizah Abdullah & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–37 OF 2007(P)
ALAUDDIN PCA, JAMES FOONG AND HELILIAH FCJJ
26 APRIL 2010

Contract — Breach — Remedies — Restitution — For someone who received benefit under contractual arrangement — Whether restitution could be ordered without compensation — Whether defendant/appellant could recover holding costs

When Abrizah Abdullah, Syed Kamil Shahabudin and Syarikat Saffora Sdn Bhd ('the plaintiffs') were allotted shares ('the shares') in Palmco Holdings Bhd ('Palmco') they were unable to take up these shares because of financial constraints. The plaintiffs then handed over the shares to one Edmund Chan, the defendant/appellant ('the defendant'), to arrange for financial facilities that would enable them to take up those shares. Thereafter the plaintiffs commenced an action against the defendant for a declaration that the shares belonged to them and for an order that the defendant sell and deliver the shares to the plaintiffs upon the plaintiffs paying certain sums of money and 'holding charges' as incurred by the defendant. The High Court found for the plaintiffs and ordered the defendant to return the shares to the plaintiffs. However, if the defendant was not in possession of the shares or was unable to deliver them to the plaintiffs the defendant had to pay the value of the shares 'as on the day the shares were made available for sale in the open market'. The defendant's appeal to the Court of Appeal was dismissed, and the Court of Appeal affirmed the orders of the High Court. The defendant then obtained leave to appeal to this court on the question of law as to whether restitution could be ordered without compensation under Malaysian law to a person who had received a benefit under a contractual arrangement. This issue arose because in the statement of claim the plaintiffs had declared that they were prepared to compensate the defendant for the return of the shares 'plus whatever holding charges were incurred by the defendant', but neither the trial judge nor the Court of Appeal had made any provisions for this payment. The plaintiffs submitted at the outset that they would pay for the cost of the return of the shares or its value thereof. As such the only issue to be determined in this case was the issue of whether the defendant was entitled to 'holding costs' for the shares. The plaintiffs defined the 'holding costs' to be interest for the loans and contended that the costs should be waived because they were servicing the interest on the loans taken by them.

Held, dismissing the appeal with costs:

(1) The 'holding costs' in this case was nothing more than the interest

payment for the loans arranged by the defendant utilising the shares as security, and perhaps also the cost for the registration of these shares into the name of the bank nominee or nominees as security for the loans. Since the plaintiffs were paying the interest on the loans no claim for 'holding costs' should be allowed. However, the plaintiffs should reimburse the defendant the 'holding costs' for the period when the plaintiffs stopped payment of the interest to the time when the shares are returned to them. In the event the holding costs cannot be agreed between the parties this will be assessed by the senior assistant registrar of the High Court (see paras 8 & 10).

(2) The costs of registration must be reimbursed by the plaintiffs to the defendant (see para 11).

[Bahasa Malaysia summary

Apabila Abrizah Abdullah, Syed Kamil Shahabudin dan Syarikat Saffora Sdn Bhd ('plaintif-plaintif') telah dibahagikan dengan syer-syer ('syer-syer') di Palmco Holdings Bhd ('Palmco'), mereka tidak dapat mengambil syer-syer tersebut atas sebab desakan kewangan. Plaintif-plaintif kemudiannya menyerahkan syer-syer tersebut kepada Edmund Chan, defendan/perayu ('defendan') untuk mengaturkan kemudahan kewangan yang akan membolehkan mereka mengambil syer-syer tersebut. Kemudiannya, plaintif-plaintif memulakan tindakan terhadap defendan bagi satu deklarasi bahawa syer-syer tersebut adalah milik mereka dan perintah bagi defendan membeli dan menjual syer-syer tersebut kepada plaintif apabila plaintif membayar sejumlah wang dan 'bayaran pegangan' yang ditanggung oleh defendan. Mahkamah Tinggi memutuskan bagi pihak plaintif dan memerintahkan defendan memulangkan syer-syer kepada plaintif. Walau bagaimanapun, jika defendan tidak mempunyai milikan terhadap syer-syer dan tidak dapat memulangkan syer-syer tersebut kepada plaintif, defendan dikehendaki membayar nilai syer tersebut 'sepertimana hari syer tersebut dijual di pasaran'. Rayuan defendan ke Mahkamah Rayuan ditolak dan Mahkamah Rayuan mengesahkan perintah Mahkamah Tinggi. Defendan kemudiannya mendapatkan usul rayuan mahkamah ini atas persoalan undang-undang iaitu sama ada satu restitusi boleh diperintahkan tanpa ganti rugi di bawah undang-undang Malaysia bagi sesiapa yang mendapat faedah di bawah aturan kontrak. Isu ini bangkit kerana di dalam penyataan tuntutan, plaintif-plaintif mengisytiharkan bahawa mereka bersedia untuk membayar ganti rugi kepada defendan bagi pemulangan syer-syer 'serta apa jua bayaran pegangan yang ditanggung oleh defendan', tetapi hakim bicara dan hakim Mahkamah Rayuan tidak memperuntukkan bagi bayaran ini. Plaintif-plaintif menghujahkan bahawa sebagai permulaan, mereka akan membayar kos pemulangan syer-syer atau nilainya. Dengan itu, isu yang perlu diputuskan di dalam kes ini adalah isu sama ada defendan berhak ke atas 'kos pegangan' bagi syer-syer. Plaintif-plaintif mentafsirkan kos pegangan sebagai faedah bagi

pinjaman-pinjaman dan menegaskan bahawa kos-kos harus diketepikan kerana plaintif telah membayar semula faedah bagi pinjaman yang diambil oleh mereka.

Diputuskan, menolak rayuan dengan kos:

(1) 'Kos pegangan' di dalam kes ini hanyalah faedah bayaran bagi pinjaman yang diaturkan oleh defendan menggunakan syer-syer sebagai sekuriti dan mungkin juga kos bagi pendaftaran bagi syer-syer ini di bawah nama bank penama atau penama-penama sebagai sekuriti bagi pinjaman-pinjaman tersebut. Memandangkan plaintif-plaintif membayar faedah bagi pinjaman, tuntutan 'kos pegangan' tidak sepatutnya dibenarkan. Walau bagaimanapun, plaintif-plaintif seharusnya membayar balik 'kos pegangan' kepada defendan bagi tempoh ketika plaintif-plaintif berhenti membayar faedah-faedah hingga ke masa syer-syer dipulangkan kepada mereka. Di dalam situasi di mana 'kos pegangan' tidak dipersetujui oleh kedua-dua belah pihak, ia akan di ditaksir oleh pemohon kanan pendaftar Mahkamah Tinggi (lihat perenggan 8 & 10).

(2) Plaintif mestilah membayar balik kos pendaftaran kepada defendan (lihat perenggan 11).]

Notes

For a case on remedies, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2747.

Appeal from: Civil Appeal No P-02–971 of 2004 (Court of Appeal, Putrajaya)

Cyrus Dass (Tan Swee Cheng with him) (Cheong Wai Meng & Van Buerle) for the appellant.
Surinder Singh (Ong & Manecksha) for the respondents.

James Foong FCJ:

[1] The plaintiffs were allotted shares (allotted shares) in a public listed company known as Palmco Holdings Bhd ('Palmco'). Due to their financial constrain, they handed the allotted shares to the defendant to arrange for financial facilities for them to take up these shares. Now they claimed for the return of the allotted shares from the defendant. In their statement of claim, they prayed for:

(1) A declaration that the allotted shares belonged to them.

(2) 'An order that the defendant do sell and deliver the said shares (allotted shares) to the respective plaintiffs upon the plaintiffs respectively paying the defendant the sum of $2,645,758, $266,812 and $870,000, plus whatever holding charges were incurred by the defendant'.

(3) In the event that the defendant is unable to deliver the allotted shares, the defendant to pay the plaintiffs damages calculated at the market value of the allotted shares from the date of the service of the writ, 'less the costs for holding of the shares at the date of the service of the writ, less the costs for holding the shares incurred by the defendant'.

[2] At the High Court, the trial judge found for the plaintiffs and made the following orders:

(a) That the allotted shares be returned to the plaintiffs.

(b) Alternatively, if the allotted shares are not in the possession of the defendant or the defendant unable to deliver these to the plaintiffs, the defendant do pay for 'the value of these shares as on the day the allotted shares were made available for sale in the open market'.

(c) Further, if the said shares are not in the possession of the defendant and the defendant is unable to deliver the said shares to the plaintiffs, then the defendant 'do pay the plaintiffs the difference if any, between the price of the shares on the day the allotted shares were made available for sale in the open market and the value of the said shares as of the date of this judgment'.

[3] Dissatisfied with this decision, the defendant appealed to the Court of Appeal. The Court of Appeal dismissed his appeal and affirmed the orders of the High Court.

[4] Leave to the appeal to the Federal Court was granted to the defendant on 24 September 2007 to refer the following question of law:

> Whether restitution could be ordered without compensation under Malaysian law to a person who has received a benefit under a contractual arrangement?

[5] Though the defendant accepts the decisions of the Court of Appeal there is one issue remaining. This is due, perhaps, to an oversight by the trial judge and the Court of Appeal in not making any provision for the payment of the allotted shares by the plaintiffs when the plaintiffs themselves in their statement of claim (see prayer 2 and 3) have declared that they are prepared to compensate the defendant for the return of the allotted shares 'plus whatever holding charges were incurred by the defendant'. Aside from this, the plaintiffs' principal witness (Syed Azahari Noh Shahbudin) in his testimony at the trial also confirmed that this should be a condition (payment for the allotted shares and holding charges) for the return of the allotted shares or its value thereof.

[6] Faced with these, the plaintiffs' counsel at the outset of his submission before us acceded to this appeal. In short, the plaintiffs must pay for cost of the allotted shares before they could get them back or its value thereof. With this, our obvious answer to the question posed must be in the negative.

[7] With this out of the way, there remain still one issue of whether the defendant is entitled to 'holding costs' for the allotted shares.

[8] We note that nowhere in the prayers of the statement of claim is 'holding cost' mentioned. In prayer 2 of the statement of claim, the plaintiffs agreed to pay to the defendant 'whatever holding charges were incurred by the defendant' and in prayer 3 thereof, the plaintiffs conceded that in order to get back the allotted shares or its value they should be 'less the costs for holding the shares incurred by the defendant'. From these, it is our opinion that 'holding cost' in this instance is nothing more than the interest payment for the loans arranged by the defendant utilising the allotted shares as security and, perhaps, also the cost for the registration of these shares into the name of the bank nominee or nominees as security for the loans.

[9] It is the contention of the plaintiffs that such holding costs should be waived since there is evidence before the trial judge that the plaintiffs were servicing the interest on the loans taken by them.

[10] Having considered this, we hold the view that since the plaintiffs were servicing the loans (paying interest) no claim for holding cost should be allowed for the period when this occurred. However, we note that the plaintiffs, at a certain period, had stopped payment of the interest. So, it is only fair and reasonable that the defendant should be reimbursed for the holding cost, from the time when such payment of interest was stopped by the plaintiffs to the time when the allotted shares are returned to them, after the plaintiffs have paid for them. If the defendant pays in lieu of the return of the allotted shares, then the holding cost should be the interest up to the date then the defendant makes such payment after setting off the amount due by the plaintiffs for the allotted shares. To defeat any attempt by the defendant in delaying payment in lieu of returning the allotted shares, we hereby make a consequential order that such payment in lieu should be made within 30 days from date hereof. In the event that the holding cost cannot be agreed between the parties then this will be assessed by the senior assistant registrar of the High Court in Penang within the 30 days from date hereof.

[11] As for the second item, the costs of registration of the allotted shares, this must be reimbursed by the plaintiffs to the defendant.

[12] There should be costs in this appeal to the defendant/appellant. Deposit for this appeal be returned to the defendant/appellant.

Appeal dismissed with costs.

Reported by Kohila Nesan